Mok Wan Seng & Ors v Green Crescent Resources Sdn Bhd & Anor and another suit

HIGH COURT (SHAH ALAM) — SUIT NOS 22NCVC-426–06 OF 2013 AND 22NCVC-401–05 OF 2013
ROZANA ALI JC
4 JUNE 2015

Land Law — Ownership — Beneficial ownership in dispute — Whether parties entered into sale and purchase agreements with intention to settle debt equivalent to value of units — Whether first defendant agreed to contra settlement — Estoppel — Whether conduct of first defendant shown acceptance of contra settlement — Whether defendants estopped from disputing plaintiffs' ownership of units — Whether PW3 had authority or power to enter into contra settlement on behalf of first defendant — Whether rule in Turquand's case applied

Green Crescent Resources Sdn Bhd ('the first defendant') had embarked on a housing development project ('the Serdang Perdana project') over a piece of land it owned in Selangor. The first defendant appointed HAC Builders Sdn Bhd ('the second defendant') as the main contractor of the Serdang Perdana project. Both the first and second defendants were wholly owned by Hiap Aik Construction Bhd ('HAB'), a public listed company, which was presently in liquidation. The second defendant had then appointed Qudotech Sdn Bhd ('QSB') as its subcontractor and QSB in turn had appointed Pakatan Dinamik Sdn Bhd and Precast as its subcontractors. In the midst of the construction, the first and second defendants and HAB had faced financial difficulties and thus were unable to pay QSB for work done. It followed that QSB also became unable to pay its subcontractors. As a result QSB and the other subcontractors refused to continue the works unless they were paid for work done and to be completed. In order to ensure that the subcontractors would continue and complete the contract works the parties decided upon a settlement. Under the settlement, the director of the first and second defendants ('PW3') agreed that the outstanding sums to all the subcontractors would be settled by giving them properties built in the project ('the contra settlement'). The subcontractors accepted the offer and in furtherance to the contra settlement the subcontractors' nominees namely the first and second plaintiffs and PW3, in his capacity as director of the first and second defendants, executed a sale and purchase agreement ('the SPA') for the sale of certain units in the Serdang Perdana project to the plaintiffs. The purchase price for the units was set off from the second defendant's indebtedness with the subcontractors and therefore the purchase price set out in the SPA was fully settled. Subsequently, the first defendant demanded payment from the plaintiffs for the purchase of the units, which it claimed were due and payable under the SPA. When the

plaintiffs refused to make payments on the grounds that that the payments had been settled by contra settlement, the first defendant challenged the first plaintiff's legal and beneficial ownership of the units through an eviction proceeding. The plaintiffs then resorted to the filing of the present suits against the defendants to seek, inter alia, a declaration that they were the beneficial owners of the units in the Serdang Perdana project by reason of a contra settlement between them and the defendants and that the latter were therefore estopped from disputing their ownership. In its defence the first defendant pleaded that there was no valid concluded contra settlement compelling it to give away its properties without any valid consideration moving to the first defendant. The defendants also submitted that the contra settlement contradicted the terms of the SPA.

Held, allowing the plaintiffs' claim with costs of RM20,000:

(1) The burden of proving that the first defendant was a party to the contra settlement and that plaintiffs did not have to pay the consideration under the SPA was on the plaintiffs. From the evidence it was clear that PW3 had been appointed to oversee all matters pertaining to the Serdang Perdana project. It is trite law that a company could only act through its directors and was responsible for any liability attached thereto. PW3 as the director in charge of the project and the common director acting for the three companies obviously had the authority to agree to the contra settlement for and on behalf of the first defendant in order to protect the interest of the company. Further the contra settlement was to benefit the first defendant as the unpaid work was completed by the subcontractors for the development project belonging to the first defendant. There would not be a need for the contra settlement if the first defendant had paid the construction works (see paras 46–48).

(2) The conduct of the first defendant demonstrated that it had agreed to the terms of the contra settlement as evidenced by the series of letter, the SPA and mutual covenant. If the first defendant had objected to the contra settlement it would have challenged and pursued a claim or even have terminated the SPA. In the circumstances the conduct of the first defendant had shown acceptance of the contra settlement. As such, estoppel by conduct applied against the first defendant in denying that there was in fact a contra settlement. The evidence showed that the SPA was entered by the first defendant with the intention to settle the debt equivalent to the value of the units. Thus, the issue of the contra settlement being void for want of consideration did not arise because it had been settled by way of contra with debts (see paras 49–51).

(3) The first defendant's contention that there was no resolution given by to PW3 to agree to the contra settlement for and on behalf of the first defendant had no merit. Section 20(1) of the Companies Act 1965

expressly states that no transaction entered into on behalf of a company by an officer of the company under any purported authority, express or implied, could be invalidated by sole reason of lack of capacity or power. Further, when a person deals with a company in good faith he need not enquire into the internal regularity of the company as per the rule in *Turquand*'s case — indoor management rule (see para 54).

[Bahasa Malaysia summary

Green Crescent Resources Sdn Bhd ('defendan pertama') telah memulakan projek pembinaan perumahan ('projek Serdang Perdana') atas sebidang tanah yang dimilikinya di Selangor. Defendan pertama telah melantik HAC Builders Sdn Bhd ('defendan kedua') sebagai kontraktor utama projek Serdang Perdana. Kedua-dua defendan-defendan pertama dan kedua dimiliki sepenuhnya oleh Hiap Aik Construction Bhd ('HAB'), sebuah syarikat awam tersenarai, yang kini dalam likuidasi. Defendan kedua kemudian teah melantik Qudotech Sdn Bhd ('QSB') sebagai subkontraktornya dan QSB telah melantik Pakatan Dinamik Sdn Bhd and Precast sebagai subkontraktornya. Semasa pembinaan itu, defendan-defendan pertama dan kedua dan HAB telah mengalami masalah kewangan dan oleh itu tidak dapat membayar QSB untuk kerja yang dilakukan. Ia diikuti bahawa QSB juga tidak dapat membayar subkontraktornya. Akibatnya QSB dan subkontraktor lain enggan untuk meneruskan kerja kecuali jika mereka membayar untuk kerja yang telah dilakukan dan akan dijangka siap. Bagi tujuan memastikan bahawa subkontraktor akan meneruskan dan menyiapkan kerja-kerja kontrak yang telah diputuskan oleh pihak-pihak setelah selesai. Di bawah penyelesaian ini, pengarah defendan-defendan pertama dan kedua ('PW3') bersetuju bahawa jumlah tertunggak kepada semua subkontraktor akan selesai dengan memberi mereka hartanah yang dibina dalam projek tersebut ('penyelesaian kontra'). Subkontraktor tersebut telah menerima tawaran dan dalam melaksanakan penyelesaian kontra itu penama-penama subkontraktor tersebut iaitu plaintif-plaintif pertama dan kedua dan PW3, dalam kapasitinya sebagai pengarah defendan-defendan pertama dan kedua, telah menyempurnakan perjanjian jual beli ('PJB') untuk jualan beberapa unit tertentu dalam projek Serdang Perdana kepada plaintif-plaintif. Harga belian untuk unit-unit tersebut telah ditolak daripada keberhutangan defendan kedua dengan subkontraktor dan oleh itu harga belian yang dinyatakan dalam PJB itu telah diselesaikan sepenuhnya. Berikutan itu, defendan pertama telah menuntut bayaran daripada plaintif-plaintif untuk belian unit-unit tersebut, yang didakwa olehnya adalah terhutang dan kena dibayar di bawah PJB tersebut. Apabila plaintif-plaintif enggan membuat bayaran atas alasan bahawa bayaran tersebut telahpun diselesaikan oleh penyelesaian kontra itu, defendan pertama telah mencabar milikan sah dan benefisiari plaintif pertama ke atas unit-unit itu melalui prosiding pengusiran. Plaintif-plaintif kemudian telah memfailkan guaman-guaman ini terhadap defendan-defendan untuk memohon, antara lain, satu deklarasi bahawa mereka adalah pemilik benefisiari unit-unit dalam

projek Sedang Perdana itu oleh sebab penyelesaian kontra antara mereka dan defendan-defendan dan bahawa defendan-defendan dengan itu diestopkan daripada mempertikaikan pemilikan mereka. Dalam pembelaannya defendan pertama mempli bahawa tidak terdapat penyelesaian kontra yang dibuat yang memaksanya menyerahkan hartanahnya tanpa apa-apa balasan sah untuk berpindah kepada defendan pertama. Defendan-defendan juga berhujah bahawa penyelesaian kontra itu bertentangan dengan terma-terma PJB tersebut.

Diputuskan, membenarkan tuntutan plaintif-plaintif dengan kos RM20,000:

(1) Beban membuktikan bahawa defendan pertama adalah pihak kepada penyelesaian kontra dan bahawa plaintif-plaintif tidak perlu membayar balasan di bawah PJB itu adalah terletak pada plaintif-plaintif. Berdasarkan keterangan ia jelas bahawa PW3 telah dilantik untuk menyelia semua perkara berkaitan projek Serdang Perdana. Ia adalah undang-undang lapuk bahawa syarikat hanya boleh bertindak melalui pengarahnya dan adalah bertanggungjawab untuk apa-apa liabiliti yang berkait dengannya. PW3 sebagai pengarah yang bertanggungjawab untuk projek itu dan pengarah biasa yang bertindak untuk tiga syarikat dengan jelas mempunyai kuasa untuk bersetuju dengan penyelesaian kontrak untuk dan bagi pihak defendan pertama bagi tujuan melindungi kepentingan syarikat. Selanjutnya penyelesaian kontra itu adalah untuk memberi manfaat kepada defendan pertama kerana kerja yang tidak dibayar telah diselesaikan oleh subkontraktor untuk projek pembinaan milik defendan pertama. Ia bukan keperluan untuk penyelesaian kontra itu jika defendan pertama telah membayar kerja pembinaan itu (lihat perenggan 46–48).

(2) Perbuatan defendan pertama menunjukkan bahawa ia bersetuju dengan terma-terma penyelesaian kontra itu sepertimana dibuktikan melalui beberapa siri surat, PJB dan perjanjian bersama. Jika defendan pertama membantah penyelesaian kontra itu ia akan mencabar dan memulakan tuntutan ataupun menamatkan PJB itu. Dalam keadaan itu perbuatan defendan pertama telah menunjukkan penerimaan penyelesaian kontra itu. Oleh itu, estopel oleh perbuatan terpakai terhadap defendan pertama kerana menafikan bahawa sebenarnya terdapat satu penyelesaian kontra. Keterangan menunjukkan bahawa PJB yang dimasuki oleh defendan pertama dengan niat untuk menyelesaikan hutang bersamaan dengan nilai unit-unit tersebut. Oleh itu, isu penyelesaian kontra itu tidak sah kerana tiada balasan tidak timbul kerana ia telahpun selesai melalui kontra dengan hutang (lihat perenggan 49–51).

(3) Hujah defendan pertama adalah bahawa tiada resolusi diberikan oleh PW3 untuk bersetuju dengan penyelesaian kontra untuk dan bagi pihak defendan pertama tidak mempunyai merit. Seksyen 20(1) Akta Syarikat

1965 dengan jelas menyatakan bahawa tiada transaksi dimasuki bagi pihak syarikat oleh pegawai syarikat di bawah apa-apa kuasa bertujuan itu, secara nyata atau tersirat, boleh menjadi tidak sah oleh satu-satu sebab kerana tidak mempunyai kapasiti atau kuasa. Selanjutnya, apabila seseorang berurusan dengan syarikat dengan niat baik dia tidak perlu menyiasat kekerapan dalaman syarikat sepertimana dalam kes *Turquand* — peraturan urusan dalaman (lihat perenggan 54).]

Notes

For cases on beneficial ownership in dispute, see 8(3) *Mallal's Digest* (5th Ed, 2015) paras 4231–4234.

Cases referred to

Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd [1995] 3 MLJ 331; [1995] 4 CLJ 283, FC (refd)
Butler Machine Tool Co Ltd v Ex-Cell-O Corpn (England) Ltd [1979] 1 WLR 401, CA (refd)
Datuk Tan Leng Teck v Sarjana Sdn Bhd & Ors [1997] 4 MLJ 329, HC (refd)
Kreditbank Cassel GMBH v Schenkers, Limited [1927] 1 KB 826, CA (refd)
Mahfuz bin Hashim v Koperasi Pekebun Kecil Daerah Segamat & Ors [2005] 3 MLJ 726; [2004] 8 CLJ 402, HC (refd)
Ngan & Ngan Holdings & Anor v Central Mercantile Corp (M) Sdn Bhd [2010] 1 MLJ 822, CA (refd)
Pacific Forest Industries Sdn Bhd & Anor v Lin Wen-Chih & Anor [2009] 6 MLJ 293, FC (refd)
Royal British Bank v Turquand (1855) 5 E & B 248, QBD (refd)
Seven Seas Industries Sdn Bhd v Philips Electronic Supplies (M) Sdn Bhd & Anor [2008] 5 MLJ 157, CA (refd)
Tan Chong and Sons Motor Company Ltd v Yang Chin Lang [1967] 1 MLJ 123 (refd)
Tan Kim Khuan v Tan Kee Kiat (M) Sdn Bhd [1998] 1 MLJ 697, HC (refd)
Tindok Besar Estate Sdn Bhd v Tinjar Co [1979] 2 MLJ 229, FC (refd)
Wong Hon Leong David v Noorazman bin Adnan [1995] 3 MLJ 283; [1995] 4 CLJ 155, CA (refd)

Legislation referred to

Companies Act 1965 ss 20(2), 147(3), 176
Contracts Act 1950 ss 26, 42
Evidence Act 1950 ss 91, 92, 114(g)
Pengurusan Danaharta National Berhad Act 1998

Muthuram (Muthu & Partners) for the plaintiffs.
K Kirubakaran (Kiru & Yong) for the defendants.

Rozana Ali JC:

INTRODUCTION

[1] The plaintiffs in both Suits No 22NCVC-426–06 of 2013 and No 22NCVC-401–05 of 2013 are seeking among others for the following reliefs:

(a) a declaration that they are the beneficial owner of the unit identified as Unit A-12A–11 (Suit No 22NCVC-401–05 of 2013) and Unit CG-51 (Suit No 22NCVC-426–06 of 2013) of Serdang Perdana and as a result the first defendant is estopped from disputing the plaintiff's right to ownership the said unit and further that the first defendant is restrained by itself and/or its agents from interfering the plaintiff's vacant possession of the said units; and

(b) cost.

[2] In this judgment, the first and the second plaintiff in Suit No 22NCVC-426-06 of 2013 and the first plaintiff Suit No 22NCVC-401–05 of 2013 will be referred to as the plaintiffs where as Qudotech Sdn Bhd that is the second plaintiffs in 22NCVC-401–05 of 2013 and third plaintiff in 22NCVC-426–06 of 2013 will be referred as QSB. Both suits were heard together as the defendants are the same and the fact and issues are similar in nature.

BACKGROUND FACTS

[3] Hiap Aik Construction Bhd ('HAB') a public listed company, desired to embark on a development project on a piece of land held under HS(D) 103045 for PT No 3590 situated in the Mukim and District of Petaling in the State of Selangor owned by the first defendant who is wholly owned subsidiary of HAB. The development project called the Serdang Perdana was to build consists of two building blocks, that is, a one block 20 storey medium cost apartment (192 unit) Phase 2 and one block 21 storey service apartments (320 unit) and others middle cost and service apartments.

[4] HAB presently in liquidation, was placed under special administration by Pengurusan Danaharta Nasional Berhad on 1 April 2002 pursuant to the provisions of the Pengurusan Danaharta National Berhad Act 1998 ('the Danaharta Act'). The first defendant being a wholly owned subsidiary of HAB also came under the purview of the special administrators ('SAs') appointed by Danaharta. The current shareholder who purchased the shares in the first defendant is Temasya Jaya Sdn Bhd ('Temasya'). The Serdang Perdana Project is also known as the Skyvilla Project was abandoned in 2001.

[5] The first defendant who was developer of the project appointed the second defendant as the main contractor at the material time. The second defendant then appointed QSB as it's subcontractor. The dispute arises from a mixed development project developed by the first defendant in the year 1997. In the midst of construction, both defendants and HAB experienced financial difficulty and consequently could not pay the subcontractor and the sub-subcontractor appointed to complete its commitment for the mixed development. This have resulted a domino effect.

[6] In order to avoid the stop of work, the second defendant with the agreement and/or knowledge of the first defendant agreed to give units to QSB to settle the debt by way of the contra settlement and consequently the works resume. Pursuant to the contra settlement, both the defendants agreed to give the following units to QSB:

Item	Unit No	Amount (RM)
1	A-3-1B	92,800.00
2	C-3-1B	114,000.00
3	B-G-11	274,800.00
4	C-G-51	289,800.00

[7] The unit C-G-51 was given to Pakatan Dinamik Sdn Bhd ('Pakatan') to settle its debt of RM172,603.17. Pakatan transfer the said unit to its' nominee that is the first and second plaintiffs. In furtherance to the contra settlement, both the plaintiffs then entered into a sale and purchase agreement ('the S&P') dated 24 July 2001 with the first defendant to ensure they were not made liable to pay the purchase price. As for unit A-12A-11, by virtue of the contra settlement between the first defendant, second defendant, Precast and the second plaintiff, the second plaintiff gave to Pakatan as settlement of its debt in the sum of RM119,784.

[8] In March 2013 the first defendant challenged the first plaintiff's legal and beneficial ownership of the said units through an eviction proceeding filed in Shah Alam High Court Suit No 24–335–03 of 2013. The hearing of this eviction proceeding has been postponed pending the outcome of this case. The first defendant demanded payment from the plaintiffs for the purchase of the units that first defendant claim which were due and payable under the S&P. The plaintiffs did not make the payments as it was settled by contra settlement. As the dispute between the first defendant and the plaintiff in respect of the units cannot be resolved, the plaintiffs have resorted to the filing of this suit against the two defendants to seek the declaratory relief.

A THE PLAINTIFF'S CASE IN SUIT NO 22NCVC-401–05 OF 2013

[9] The plaintiff's alleged in the statement of claim that:

(a) the first and second defendants are a wholly owned subsidiary of HAB a public listed company and since wound up;

B

(b) the second defendant was appointed as the main contractor for the said Serdang Perdana Project;

(c) all the shares of the first defendant and second defendant are wholly owned by HAB and the directors in both are directors of HAB and/or its nominee appointed by HAB;

C

(d) at all material times the first defendant and second defendant were under the control of HAB. All directions and decisions were made by HAB through its directors or nominee directors who sit on the board of the first defendant and second defendant;

D

(e) PW3 — one Yap Ah Bee played an instrumental role for HAB, the first defendant and the second defendant was also the common director for the three entities;

E

(f) further and in the alternative, at all material times PW3 is the agent for the first and second defendant and has the authority to make decisions on their behalf;

F

(g) despite the first defendant and second defendant being separate legal entities, they were managed as one sole commercial entity for HAB for management and accounting purposes;

(h) the second defendant appointed by the first defendant as the main contractor for the project, in turn appointed Precast Buildings Sdn Bhd ('Precast') as the subcontractor;

G

(i) Precast in-turn appointed the second plaintiff was as the sub-subcontractor to carry out the 'Electrical Low Voltage and Communication Services' in accordance to the contract dated 11 December 1999;

H

(j) the second plaintiff in-turn appointed Pakatan as the sub-sub-subcontractor to carry out the 'Electrical Low Voltage and Communication Services' in accordance to the contract dated 3 March 2000;

I

(k) the contract works are carried out at stages and Precast will pay the second plaintiff when the second plaintiff (Precast and not second plaintiff) is paid by the second defendant. The second plaintiff in-turn will pay Pakatan upon receipt of payment from Precast;

(l) as of October 2000, Precast owed the second plaintiff the sum of RM366,515.01 being the progressive works which is inclusive of the works carried out by Pakatan;

(m) due to the first defendant's failure to pay the second defendant, the second defendant failed to pay Precast, Precast in-turn was unable to pay the second plaintiff and the second plaintiff was therefore unable to pay Pakatan;

(n) the second plaintiff and Pakatan refused to continue with their services until their debt was resolved and guaranteed that the future services will be paid in full;

(o) to avoid any delay to the development works, the first defendant and second defendant proposed to give the unit in the said Project as settlement of the debt between the first defendant and second defendant, Precast and its appointed contractors which included the second plaintiff and Pakatan;

(p) unit A-12A-11 was one of the unit (the other being A-12A-12) given by the second defendant and within the knowledge of the first defendant in settlement of half the debt between the first defendant, second defendant, Precast and the second plaintiff;

(q) at all material times, the first defendant and second defendant had knowledge or ought to have knowledge that Precast used the said units to settle the debts to the second plaintiff amounting to RM239,568;

(r) by virtue of the contra settlement between the first defendant, second defendant, Precast and the second plaintiff, the second plaintiff gave unit A-12A-11 to Pakatan as settlement of its debt in the sum of RM119,784;

(s) Pakatan appointed its nominee the first plaintiff to accept the unit A-12A-11 without any objection from the parties;

(t) the S&P dated 9 November 2000 was executed between the first plaintiff and first defendant to facilitate the contra settlement;

(u) the purchase price for the said unit is to settle the first defendant's debt to the second defendant, the second defendant to settle its debt to Precast, Precast to settle its debt to the second plaintiff, and the second plaintiff to settle its debt with Pakatan;

(v) to ensure that the subcontractors of Precast including the second plaintiff and its subcontractor Pakatan will continue and complete the contract works;

(w) to assist the first defendant and second defendant to obtain sufficient 'clash flow' to complete the project so as not to be abandoned;

(x) following that second plaintiff between the first defendant half Precast's indebtedness with the second plaintiff in the sum of RM239,568 and therefore the purchase price set out in the S&P was settled;

(y) the first plaintiff became the beneficial owner of the said unit upon execution of the S&P dated 9 November 2000 and the first defendant cannot dispute the first plaintiff's title to the said unit and not interfere with the use of the said unit;

(z) the first defendant had breached the contra settlement by disputing the first plaintiff's title to the said unit by initiating an action in the Shah Alam High Court OS Suit No 24–335–03 of 2013 wherein the first defendant had interfered with the peaceful use of the said unit and to evict the first plaintiff's tenant, one Amin Jula on the grounds that the first defendant was the owner of the said unit;

(aa) the first defendant had no right to dispute the first plaintiff's ownership of the unit in view of the contra settlement reached between the first defendant, second defendant, Precast, the second plaintiff and Pakatan as the purchase price for the SPA for the unit was settled via the contra settlement for the debt of RM239,568 between the parties;

(ab) after the first plaintiff executed the S&P, the first defendant had accepted the first plaintiff as the beneficial owner of the said unit who took all consistent steps as a beneficial owner not limited to paying all maintenance, service charges and assessment that the first defendant claims from time to time;

(ac) as a result of the settlement reached by the first defendant, second defendant, second plaintiff, Precast and Pakatan the first defendant is estopped from disputing the ownership of the unit and interfere with the use of it;

(ad) the first defendant had breached the settlement agreement in disputing the ownership of the unit of the first plaintiff and commencing OS No 24–335–03 of 2013 in Shah Alam High Court to remove the tenant occupying the unit on the basis that the first defendant was the owner;

(ae) the first defendant has no right to dispute the plaintiff's ownership of the unit by denying the contra settlement and/or the validity of the contra settlement based on the representations made by the first defendant to the plaintiffs;

(af) as a result therefore, the debt of RM239,568 owed between the first defendant, second defendant, Precast, the second plaintiff and Pakatan was settled by way of contra and execution of the S&P;

(ag) the second plaintiff deemed the indebtedness with Precast settled and therefore waived its right to take any action to claim from Precast; and

(ah) alternatively, the first defendant was bound by the contra settlement as the second defendant and PW3 acted as an agent to the first defendant and second defendant to enter into a contra settlement with Precast and/or the second plaintiff.

THE PLAINTIFF'S CASE IN SUIT NO 22NCVC-426–06 OF 2013

[10] The plaintiff's alleged in the statement of claim that:

(a) the first and second defendants are a wholly owned subsidiary of HAB a public listed company and since wound up;

(b) all the shares of the first defendant and second defendant are wholly owned by HAB and the directors in both are directors of HAB and/or its nominee appointed by HAB;

(c) at all material times the first defendant and second defendant were under the control of HAB. All directions and decisions for the first and second defendant were made by HAB through its directors or nominee directors who sit on the board of the first defendant and second defendant;

(d) further or in the alternative, PW3 is an agent of the first defendant and second defendant and has the authority to make decisions for the first defendant and second defendant;

(e) further or in the alternative, despite the first defendant and second defendant being separate legal entities, they were managed as one sole commercial entity by HAB for management and accounting purposes;

(f) the second defendant was appointed as the main contractor for the said project;

(g) the second defendant as the main contractor for the project on 29 January 1999 appointed the QSB as the subcontractor to carry out all supply works, delivery, installation, testing and commissioning of electric works, telephone, sanitary plumbing services, which was accepted by the QSB on 10 February 1999 for a contract sum of RM5,180,000;

(h) the QSB in-turn appointed Pakatan Dinamik Sdn Bhd ('Pakatan') as the sub-subcontractor to carry out the 'Electrical Services for Block A & B and External Works' for the sum of RM1,278,180;

(i) the contract works are carried out at stages and QSB will be invoiced by Pakatan. The QSB in-turn will claim from the second defendant and the second defendant will then pay the amount invoiced. When the QSB is paid, Pakatan will receive payment;

(j) as of early 2001, the QSB submitted to the second defendant vide claims dated 20 February 2001 and 20 March 2001 a claim for the sum of RM768,181.40 for the progressive works;

(k) due to the second defendant's failure to pay the QSB claim and indirectly the subcontractors appointed by the QSB;

(l) Pakatan and all other subcontractors appointed by the QSB refused to continue with their services until their debt was resolved and was guaranteed that the future services will be paid in full;

(m) to avoid any delay to the development works, the second defendant with the consent and of the knowledge of the first defendant agreed to give shop/apartment units in the said project as settlement of the debt to the QSB to enable the QSB to settle its debt with its subcontractors including Pakatan;

(n) pursuant to the contra settlement agreed to by the first defendant, second defendant, QSB and Pakatan (together with all other subcontractors), the first defendant and second defendant allocated and gave the shop units/apartments as set out in para 23 of the statement of claim to settled the second defendant's indebtedness with the QSB;

(o) the second defendant's failure to settle its indebtedness with the QSB resulted in the QSB owing Pakatan and the sub-subcontractors appointed by it for work done;

(p) as agreed between the first defendant, second defendant, QSB and Pakatan and with the intention and purpose of the contra settlement, the said units were given to the sub-subcontractors including Pakatan as settlement of the QSB indebtedness to them;

(q) the QSB gave the unit C-G-51 to Pakatan as settlement of its debt in the sum of RM172,603.07 and for future works due to be completed in accordance with the subcontract works as set out in para 15 of the statement of claim;

(r) Pakatan appointed its nominee the first and second plaintiffs to accept the unit C-G-51 without any objection from the first defendant and second defendant;

(s) the sale and purchase agreement dated 24 July 2001 was executed between the first and second plaintiffs and first defendant to facilitate the contra settlement and based on the grounds set out in para 29 of the statement of claim;

(t) the purchase price for the unit was set off from the second defendant's indebtedness with the QSB and therefore the purchase price set out in the SPA was fully settled;

(u) the plaintiffs became the beneficial owners of the said unit upon execution of the SPA and took all consistent steps as the beneficial owner without any objection from the first defendant and the first defendant cannot dispute the first and second plaintiffs title to the unit;

(v) the first defendant had no right to dispute the first and second plaintiffs' ownership of the unit in view of the contra settlement reached between the first defendant, second defendant, the QSB and Pakatan as the purchase price for the SPA for the unit was settled via the contra settlement;

(w) to protect their ownership of the said unit, the first and second plaintiffs instructed their solicitors to obtain a guarantee from the first defendant that the first defendant will honour and not deny the first and second plaintiffs' ownership of the said unit which the first defendant refused to do so;

(x) the first defendant does not have the right to dispute the first and second plaintiffs the ownership of the unit in accordance with the contra settlement achieved between the first defendant, second defendant, QSB and Pakatan that the purchase price of the said unit was settled via contra and the first and second plaintiffs have obtained a good title of the said unit;

(y) the first defendant is estopped from disputing the ownership of the first and second plaintiffs' said unit and denying the contra settlement and/or the validity of the contra settlement based on the representations made by the first defendant to the plaintiffs;

(z) as a result therefore, the QSB deemed the indebtedness by the second defendant to itself settled and therefore waived its right to take any action to claim from the second defendant;

(aa) if the first defendant and second defendant is permitted to deny the contra settlement arrangement then the QSB is exposed to liability from Pakatan and the first and second plaintiffs; and

(ab) alternatively, the first defendant was bound by the contra settlement as the second defendant and PW3 acted as an agent to the first defendant to enter into a contra settlement with the QSB and Pakatan.

WITNESSES

[11] The plaintiffs had five witnesses namely:

(a) PW1 — Mr Yap Kwee Lim. He is the director and shareholder of Precast; (relevant to Suit No 22NCVC-401–05 of 2013);

(b) PW2 — Mr Tan Siew Kheng. He is the director and shareholder of QDS at the material time;

(c) PW3 — Mr Yap Ah Bee. He is the common director of HAB and both the defendants;

(d) PW4 — Mr Mok Wan Seng. He is the director and shareholder of Pakatan and the owner of unit No C-G-51 (PW2 to PW4 relevant to both suits); and

(e) PW5 — Madam Moong Kin Ying. She is the unit owner of No A-12A-11 (relevant to Suit No 22NCVC-401–05 of 2013).

[12] The defendants in both suits had one witness, namely:

(a) DW1 — Ms Teoh Yee Shien. She is company secretary and the account and finance manager of first defendant.

THE PLAINTIFF'S SUBMISSION

[13] The plaintiffs submitted that they have had vacant possession of the units and contended that first defendant had agreed to the contra settlement. PW3 as director in charge of the development project of the first defendant had the authority and had agreed to the settlement agreement for the first defendant. In fact PW3 signed the S&P on 24 July 2001 immediately thereafter from confirmation of the nomination of the contractors. As a director, PW3 is the arms and mind and an agent of a company. Accordingly the liability would attach to the principal, namely the company.

[14] The plaintiff submitted PW3 had confirmed that HAB owns all the shares in the first defendant and gives directions and the directors of the first and second defendants to implement the same. PW3 also confirmed that all the directors of the first defendantwere appointed by HAB. PW3 also confirmed that he was appointed as the authorised agent for HAB in the first defendant pursuant to s 147(3) of the Companies Act 1965 and was also made to be in charge and makes all the decision in respect of the first defendant's development project. The plaintiffs submitted that the defendants only rebutted this evidence through DW1 but DW1 was never with the first defendantduring the material period of 1999–2002. She worked for the first defendant only in 2003 and had agreed that PW3 could have permitted to the contra settlement.

[15] The plaintiffs further submit that there were many other directors who had personal knowledge of this matter whom the defendants could have called to rebut but it chose not to call any of them. Instead the defendants only relied on DW1's testimony that was not even in the employment of the first defendant until 2003 and this would constitute hearsay as she does not have any personal knowledge. As far as the plaintiffs are concerned they have met the burden to prove that the first defendant had agreed to the contra settlement and that accordingly the first defendant gave the said units to the QSB in settlement of the debt in question.

[16] The plaintiffs also submitted that as the director in charge of the development project it was incumbent upon PW3 to salvage the situation, namely to get the contractors to commence work. When HAB agreed to give the properties of the first defendant to overcome the impasse, PW3 had the authority to agree for the first defendant to give the said units. This is further fortified by the fact that HAB, first and second defendants were practically one corporate unit. Therefore the first defendantis liable under the contra settlement agreed upon by PW3 as director and agent.

[17] The next issue raised by plaintiffs is the first defendant's acceptance of the contra settlement by conduct. The conduct of the first defendant confirms that it accepted the terms of the contra settlement. If it was not agreed certainly it would have pursued the claim earnestly and terminated the S&P. Instead of terminating, the first defendant admitted to owing liquidated ascertained damages ('LAD') and proceeded to invite them to a scheme of arrangement to procure a waiver of the debt and approval for an extension of time to complete the project. In fact the first defendant proceeded only to demand for water and electricity charges. If the purchase price was intended to be paid by anyone, it is inconceivable for the first defendant to claim only the water and electricity charges when the entire purchase price was already long overdue.

[18] The plaintiffs also submitted that if PW3 did not have the authority certainly the management of the first defendant, it would have pursued with the claim and terminated the S&P for non-payment and none of this happened except the claim for water and electricity charges and was paid. In addition,the conduct of the first defendant whether it was under the management of PW3 or under the new management of Temasya was consistent with an acceptance of the terms of the contra settlement. Hence, by the conduct of first defendant, the plaintiff submitted that it would be gleaned that the first defendant had agreed to the terms of the contra settlement.

[19] The plaintiffs submitted that the defendant is estopped from denying that there is a contra settlement with QSB — pre-change of management between 6 June 2001 and 4 November 2003. Although the pre-management change or post management change, it does not have any bearing in determining the question of estoppel. The plaintiffs contended that PW2 and PW4 have clearly stated that if not for the purposes of settlement of their debt, they would not have gone along with the contra settlement and PW4 testify that he would not have signed the S&P. Further, if the first defendant had objected to the contra settlement during the material period for lack of agreement, QSB and Pakatan would not have continued with the work. Under such circumstances certainly Pakatan and QSB would not be out of pocket for the work it completed after entering into the S&P. Pakatan would have certainly sued the QSB and inturn QSB would have sued the second

defendant. If the second defendant sued HAB or first defendant then the new management certainly would not have had the opportunity to purchase the first defendant and make a profit out of this venture.

[20] The plaintiff submitted that first defendant's conduct has constituted a representation to the plaintiffs through PW3 that it agrees to give the units in settlement of the debt owed by the second defendant and accordingly the purchase price under the S&P is deemed settled. The conduct of not pursuing for any money certainly is consistent with such representation. The act of the first defendant quietly observing QSB and Pakatan to resume work certainly makes them aware that they are doing so on the believe that the debt is settled by the agreement of the first defendant to give the units.

[21] The plaintiff also submitted that the first defendant has gained from the resumption of work and if the first defendant is allowed to terminate the S&P, the work completed by QSB and Pakatan and the works completed thereafter under the encouragement that the contra settlement is valid, will practically be a gift to the first defendant. Therefore, under such circumstances it is unconscionable for the first defendant to invalidate the contra settlement whether on grounds of want of authority of PW3 to agree or want of proper corporate documents or want of a written document or even on the grounds that it is invalid. Thus, the first defendant is estopped for his conduct.

[22] The plaintiff also submitted that the first defendant is estopped from denying that there is a contra settlement with QSB — post change of management. After Temasya entered into the SAs on 4 November 2003, one Prinsiptek (M) Sdn Bhd (a joint venture party with Temasya to take over the shares of HAB) held a discussion with PW2 regarding the contra settlement. PW3 confirm that the discussion took place vide letter dated 24 February 2004 and all the relevant documents were given to Prinsiptek. DW1 also admitted that the letter was discussed in the meeting. After having received all the documents, Temasya proceeded to complete the purchase of the shares under the SAs, namely on 12 October 2004 with full knowledge of the contra settlement. DW1 confirmed that they did not communicate with the SAs to verify the contra settlement. DW1 also confirmed that they did not communicate with any of the directors of HAB or even the previous directors of the first defendant or the second defendant. The plaintiffs contended that if the contra settlement was not agreed upon and challenged then a reasonable person in business would have questioned the SAs or even investigated the veracity of this claim and in this case Temasya had not done so. Thus, the plaintiff submitted is consistent with the fact that the acquisition of the first defendant was made with full knowledge of this set off arrangement and that it has accepted the same to be valid.

[23] The first defendant (under the new management) and QSB are persons of business and as such when QSB wrote a letter stating that there is a contra settlement between the first defendant and QSB, it is only reasonable to expect the first defendant to deny its existence if it is not true. Therefore the plaintiff submitted that if the first defendant failed to do so, it will be estopped from denying the existence of the contra settlement.The plaintiff cited the case of *Wong Hon Leong David v Noorazman bin Adnan* [1995] 3 MLJ 283; [1995] 4 CLJ 155 where there was an allegation of an agreement to pay a sum of money. The appellant denied the existence of the same during hearing but failed to dispute the existence when the respondent wrote earlier to confirm the existence by way of a letter. The court held that if a man of business has stated to another that he has agreed to do certain things, the person who receives that letter must answer if he wishes to dispute. Failure to do so will lead the court to uphold the agreement.

[24] The plaintiff also submitted that apart from failing to reply the letter dated 24 February 2004, the first defendant in 2003–2005 had conducted schemes of arrangement under s 176 of the Companies Act 1965 where it included the first plaintiff to vote on resolutions for an extension of time to complete his unit and consequently to have the right to LAD waived. This act of including the first plaintiff in the scheme of arrangement (with the knowledge of the set off arrangement) is a clear prove of acceptance by the first defendant that the contra settlement as stated in the letter dated 24 February 2004 is recognised and valid. The plaintiff submitted that it is a clear position in law that only purchasers who are not in breach of the S&P are entitled to the LAD. It is also a clear position in law that when a purchaser does not pay the purchase price the vendor is entitled to terminate the S&P. The first defendant did not terminate the S&P instead invited the first plaintiff to the creditors' meeting. This leads any reasonable person to believe that the contra settlement is honoured, the purchase price is settled using the debt and the plaintiff are entitled to the said units.

[25] The plaintiff also submitted that the first defendant (under the new management) did not invoice for the purchase price since 2003 until early 2006 despite them being aware that no payment was ever made by the plaintiffs. DW1 confirmed that she was made aware of the set off involving the units as early as 24 February 2004 and confirmed that she had within her all the set off letter referred belonging to the plaintiffs and that there was no payment made. Thus the plaintiffs submitted that based on the information available the first defendant was and is aware that the units were given to set off debt owed by the second defendant. There was no claim the purchase price and was silent from 2004–2006. Instead there was an admission or owing LAD to the plaintiff and had called them twice to vote at the scheme of arrangements. This inconsistent conduct proves that the denial of the set off arrangement now by

alleging lack of corporate documentation, lack of authority and lack of documents are an afterthought.

[26] The plaintiff submitted that the act of not terminating the S&P constitute evidence that the defendants did acknowledge the set off or constitute an encouragement that the contra settlement is recognised.The delay in invoicing was not accidental but intentional and constitutes a tactical move by the new management to first lull the mind of the QSB from suing the second defendant, HAB and the first defendant. The plaintiff submitted that this contention can be supported from the following facts:

(a) the new management bought the shares of HAB in the first defendant pursuant to a SAs dated 4 November 2013 wherein pursuant to this sale HAB agreed to waive all the debt owed by the first defendant to HAB;

(b) pursuant to the SAs the waiver of debt by HAB will be confirmed when the SAs is completed;

(c) the new management came to know about the plaintiff's set off claim on 20 February 2004. The new management proceeded to complete the SAs on 12 October 2004 and claim the waiver despite this knowledge of set off; and

(d) the new management did not reject the set off as at 12 October 2004 because if it had done so, the QSB would have certainly sued the second defendant and the second defendant would have sued HAB.

Therefore the plaintiff submitted that the motive here is to avoid QSB from pursuing its claim against the second defendant and HAB until completion of the SAs so that HAB will complete the waiver of debt amounting to RM5,664,484. If the new management had made a stand to dismiss the claim on 20 February 2004, the new management would not have got the waiver because when QSB sues the second defendant the second defendant would have sued HAB for the sum of RM289,900 and HAB in return would have to pursue its claim against the first defendant, at which point the waiver would not have materialised.

[27] The plaintiffs submitted that the doctrine of estoppel is applicable in this case. The plaintiff cited the case of *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331; [1995] 4 CLJ 283 where the court held that the doctrine of estoppel 'is a doctrine of wide utility and has been resorted to in varying fact patterns to achieve justice. Indeed, the circumstances in which the doctrine may operate are endless'. As such plaintiffs submitted that the real inquiry is whether there is something in the circumstances of this case that renders it unconscionable to permit the first defendant to exercise its rights to deny the contra settlement whether it is for

want of authority of PW3 to agree or want of proper corporate documents or want of a written document evidencing agreement or even on the grounds that it is invalid. The plaintiffs submitted that they clearly establish that it is unconscionable for the first defendant to insist on its strict right to deny the settlement agreement especially taking into the following consideration:

(a) the 75% work that was completed when the new management took over comprises of the work completed by QSB;

(b) DW1 cannot prove that the first defendant had paid for this work;

(c) the first and second plaintiffs as the owner of the units have permanently lost the cause of action for their respective debt. OSB cannot now sue the second defendant and or vice versa. This is because the cause of action on the second defendant cannot be made after 19 March 2007;

(d) the second defendant has lost its cause of action against the first defendant permanently too; and

(e) if the first defendant is allowed to strike down the contra settlement agreement 14 years down the road, the first defendant would be unjustly enriched and the plaintiffs would be unjustly impoverished.

[28] As to the absence of company's resolution giving PW3 authority to agree to the contra settlement for and on behalf of the first defendant, the plaintiffs submitted that this line of attack is 14 years too late because if the first defendant desired to strike down on this ground it should have done so at the first available opportunityand the plaintiffs could have taken the necessary steps to overcome the insufficiency and not when the first defendant had benefited from the contra settlement. Thus, the first defendant is estopped from insisting on strict adherence to corporate regulations at this late hour. Furthermore, the plaintiff submitted that when a person deals with a company in good faith he need not inquire into the internal regularity of the company as enunciated in *Turquand*'s case known as the 'indoor management rule'. As such the plaintiffs who acted in good faith are entitled to rely on the presumption that PW3 had the authority to bind the first defendant.

[29] As for the principle of equity, the plaintiffs submitted that the plaintiffs claim is genuine. The contention that the S&P was entered into in pursuance of the contra settlement is valid. The value of the units are the same as the value of the debt being bartered and all correspondences refers to 'contra settlement' and the first defendant had a copy of these at all material times. The plaintiff also submitted that the conduct of the parties was consistent with the settlement where the first plaintiff was never invoiced. The new management also did not do so until much later in June of 2006. Even then the first plaintiff was encouraged to ignore payment. DW1 testified that she cannot prove that the first defendant had paid the first defendant for the work completed by the

A third plaintiff. PW3 confirms that he signed the sale agreement in pursuance of the settlement agreement and was indeed entered into in settlement of the debt owed.

THE DEFENDANTS' SUBMISSIONS

B

[30] The defendants did not agree to contra settlement and contended that none of the letters that were submitted by the plaintiff has stated that the first defendant had agreed to give its' properties away. DW1 had testified that the subject unit was the property of the first defendant. The second defendant C (although was the sister company of the first defendant) had no right to give it away without the first defendant's approval since the units were owned by the first defendant and not by the second defendant. Furthermore HAB's undertaking, (as the parent company) cannot be enforced on the first defendant pursuant to s 42 of the Contracts Act 1950. There were also no D documentary evidences to show the first defendant had agreed to the contra settlement and the letters submitted by the plaintiffs also did not collaborates the contra arrangement. These letters are:

(a) QSB's letter dated 26 April 2001 addressed to the second defendant (p 35 of Bundle B); E

(b) Pakatan's letter dated 10 May 2001 addressed to QSB (p 36 of Bundle B);

(c) QSB's letter dated 12 May 2001 addressed to second defendant (p 37 of Bundle B);

F (d) Pakatan's letter addressed to QSB (p 38 of Bundle B); and

(e) letters at pp 39–46 of Bundle B.

The defendant submitted that none of those letters were either written to or G written by the first defendant. None of those letters stated that the first defendant had agreed to give its properties away in the contra settlement.Therefore, the letters relied upon by the plaintiffs did not prove that the first defendant had agreed to the contra settlement.

H **[31]** The defendants submitted that PW3 is not clothed with authority to give the units to settle the debts of second defendant as the plaintiff had failed to produce any board resolution of first defendant authorising PW3 to give away the units. Therefore PW3 as a common director of the first and second defendants could not without the authority of the first defendant's Board of I Directors give away its properties purportedly to settle the debts of the second defendant. The defendant submitted that when the resolutions for the relevant period of the first defendant's minutes book was shown to PW3 to show if such authority had been given to him, it was conceded that there was no such resolution. The plaintiffs and PW3 appear to be ignorant of the law that

prevents a holding company giving away or dealing with the property belonging to its subsidiary. The same applies for PW3 on behalf of the second defendant attempting to give away properties of first defendant. The defendants refers to the case of *Ngan & Ngan Holdings & Anor v Central Mercantile Corp (M) Sdn Bhd* [2010] 1 MLJ 822 at pp 832–833 where Ramly Ali JCA said:

> [17] The defendants contended that by virtue of the controlling stake of WTK in the plaintiff company in terms of management and majority of its shareholdings, WTK was at all material times and is in de facto control of the plaintiff company, therefore being in a position to contract for and on behalf of the plaintiff. They cited the decision of the Federal Court in *Sunrise Sdn Bhd v First Profile (M) Sdn Bhd & Anor* [1996] 3 MLJ 533; [1997] 1 CLJ 529 to support the proposition.
>
> [18] The court finds that the decision in *Sunrise Sdn Bhd* is distinguishable and cannot be applied to the facts of the present case. In that case, the subsidiary in question was wholly owned by the holding company ie the whole of the 100% shares in the subsidiary were owned by the holding company. There was no other shareholder involved. While in the present case the plaintiff company is not a wholly owned subsidiary of the holding company (WTK). WTK owned only 85% of the plaintiff's shares while the other 15% were owned by third parties. The interest of the other shareholders, although minority must also be considered and protected by the law.
>
> [19] The plaintiff company is the registered proprietor of the said property. Although WTK is a shareholder of the plaintiff company, this does not give WTK the right to deal with the property of the plaintiff company, let alone to give the plaintiff's property away. The plaintiff as a company duly incorporated under the Companies Act 1965, is a separate legal entity from its shareholders (see *Salomon v Salomon & Co, Ltd* [1895-99] All ER Rep 33; [1897] AC 22; *ATA Management Consultants Sdn Bhd v Makmuran Sdn Bhd* [2004] 3 CLJ 53; and *Abdul Aziz bin Atan & 87 Ors v Ladang Rengo Malay Estate Sdn Bhd* [1985] 2 MLJ 165; [1985] 1 CLJ 255).
>
> [20] Being separate legal entitles, one cannot be held liable for the wrong of the other (see *Hong Kong Vegetable Oil Company Ltd v Malim Sirinaga Wicker & Ors* [1978] 2 MLJ 13).
>
> [21] It is trite law that no person can give a better title than he had memo dat quod non habet. Therefore, WTK, not being the registered proprietor of the property was never in a position to give the property as a gift or gratuity to the second defendant (see Supreme Court decision in *M & J Frozen Food Sdn Bhd & Anor v Siland Sdn Bhd & Anor* [1994] 1 MLJ 294; [1994] 2 CLJ 14).

[32] Thus, the defendant submitted that the Serdang Perdana project is the property of the first defendant and not the second defendant (although it is the parent company of the first defendant). Therefore PW3 had no right over first defendant's properties.

[33] The defendant submitted that the contra settlement is void for want of consideration. It is not in dispute that QSB and Pakatan had no contractual relationship with the first defendant as admitted by DW2 who represented QSB. Likewise the plaintiff did not plead nor was there evidence that the first defendant owed the second defendant, QSB and Pakatan any monies. Therefore there is no valid concluded contra settlement compelling the first defendant to give away its properties without any valid consideration moving to the first defendant. The defendant refers to s 26 of the Contracts Act 1950 that an agreement made without consideration is void unless:

(a) it is in writing and registered; or

(b) or is a promise to compensate for something done; or

(c) or is a promise to pay a debt barred by limitation.

[34] Thus, the defendants submitted that the contra settlement does not fit into any of the exceptions in s 26 of the Contracts Act 1950 because it is neither in writing and registered nor it is a promise to compensate for something done by the plaintiffs to the first defendant nor it is a promise to pay a debt due from the first defendant which was barred by limitation. Therefore, in these circumstances, the plaintiffs are bound by the terms of the S&P and the contra settlement is and cannot be said to be collateral to the S&P. Moreover, the plaintiffs have failed to prove on a balance of probabilities that the first defendant had agreed to the contra settlement.

[35] The defendants submitted that the contra settlement contradicted the terms of the S&P. If the oral contra settlement is proven, the plaintiffs need not pay the consideration due under the S&P and the first defendant is therefore not entitled to terminate the same. Therefore this is not permissible. The defendants refer to ss 91 and 92 of the Evidence Act 1950 and the case of *Datuk Tan Leng Teck v Sarjana Sdn Bhd & Ors* [1997] 4 MLJ 329. The defendant further submitted that the oral contra settlement must not be in consistent with the written contract and refer to the case of *Tan Chong and Sons Motor Company Ltd v Yang Chin Lang* [1967] 1 MLJ 123; *Seven Seas Industries Sdn Bhd v Philips Electronic Supplies (M) Sdn Bhd & Anor* [2008] 5 MLJ 157 and *Tindok Besar Estate Sdn Bhd v Tinjar Co* [1979] 2 MLJ 229 where Chang Min Tat FJ had said:

> However s 92 allows, so far as it concerns this particular case, evidence in proviso (b) of 'any separate oral agreement, as to any matter on which a document is silent and which is not inconsistent with its terms' and in proviso (c) of 'any separate oral agreement constituting a condition precedent to the attaching of any obligation under any such contract ...'. The provisos quality but do not eliminate the main provisions of the section, so that unless the additional evidence sought to be adduced falls within the scope of any of the provisos, it should not be allowed to be introduced as it would be to contradict, vary, add to or subtract from the terms of

the agreement. It will be readily seen that the evidence which the respondent sought to introduce did not fall within either of these two provisos but was evidence adding a new term or terms to the agreement. It is equally obvious that the respondent's pleadings did not aver the existence of such terms.

[36] The defendant also relied on cl 36 of the S&P (at p 64 of Bundle B) whereby the plaintiffs have agreed that:

all previous agreements, representations, warranties expressed or complied, oral or in writing or by conduct between the parties hereto are hereby superseded and of no effect.

[37] The defendants also submitted that nowhere in the statement of claim did the plaintiffs plead that the first defendant owed second defendant, QSB or Pakatan. In *Pacific Forest Industries Sdn Bhd & Anor v Lin Wen-Chih & Anor* [2009] 6 MLJ 293 at p 294, the Federal Court held that:

It is not for the court to decide upon what principle a party should plead his case. It is for that party to identify it himself (see paras 13–15); *Tan Kong Min v Malaysian National Insurance Sdn Bhd* [2006] 1 MLJ 601 referred; *Hock Hua Bank (Sabah) Bhd v Yong Liuk Thin & Ors* [1995] 2 MLJ 213 referred; *Janagi v Ong Boon Kiat* [1971] 2 MLJ 196 referred.

It is dangerous and not advisable for the court, on its own accord, to consider a point without reliance on any pleadings or submissions by counsel. If a judge thinks, there are any points which are relevant to the case before him and which was not raised by either party, it is his duty to highlight those points to the parties before him. He must then give an opportunity for both parties to further submit on those particular points. Where a judge makes a decision on an issue that is not based on the pleadings and without hearing the parties on that issue, the judge would then be in breach of the legal maxim audialterampartem (see paras 16–17), *Hoecheong Products Co Ltd v Cargill Hong Kong Ltd* [1995] 1 WLR 404 referred.

The defendant submitted that in this instant case, it was pleaded on a breach of contract and nothing in the pleadings related to frustration. The parties had not pleaded frustration. Neither had they submitted that the contract had been frustrated. The Federal Court would thus answer the first question posed in the negative.

[38] In the alternative, the defendant submitted that the plaintiffs have failed to prove that first defendant had owed either Qudotech or HAB any monies. The defendants argued that the burden of proof rests throughout the trial on the party on whom the burden lies. In *Tan Kim Khuan v Tan Kee Kiat (M) Sdn Bhd* [1998] 1 MLJ 697 at p 706D His Lordship had said:

It is settled law that the burden of proof rests throughout the trial on the party on whom the burden lies. Where a party on whom the burden of proof lies has discharged it, then the evidential burden shifts to the other party ... What shifts is the responsibility of adducing evidence to discharge that burden ... When the

burden shifts to the other party, it can be discharged by cross-examination of witnesses of the party on whom the burden proof lies or by calling witnesses or by giving evidence himself or by a combination of the different methods. No adverse inference can be drawn against that part for failure to give evidence himself. If he does not adduce any evidence when the burden has shifted to him, he will fail.

[39] The defendants submits that if the submission mentioned above is decided in their favour then the remaining issues ought to be decided against the plaintiffs.

ISSUES

[40] As per the proceeding of these suits, parties had agreed to the following issues to be tried:

(a) whether there was a contra settlement to settle the debt between QSB, Pakatan, first defendant and HAB;

(b) whether the S&P entered by the plaintiffs with first defendant was in furtherance to the contra settlement;

(c) whether following the contra settlement, the plaintiffs had settled the purchase price for units in question;

(d) whether the plaintiffs were the beneficial owner of the units in the Serdang Perdana project; and

(e) whether the first defendant has an obligation to deliver vacant possession of the unit to the plaintiffs.

[41] Having heard from parties, the court is of the view that the main issue to be determined is whether or not the first defendant agreed to the contra settlement. The remaining issues advanced by the parties will be dealt together with the main issue.

FINDINGS

[42] The claim in both suits mentioned above are similar in that both plaintiffs seek for a declaration that they are the absolute beneficial owner of the units being the subject matter in pursuant of a contra settlement between QSB and both defendants.

[43] In both suits the court took into consideration the fact that the subject matter of dispute in this action concern with ownership claim of the said units in Serdang Perdana project developed by the first defendant while the second defendant was the main contractor. Both the first and second defendants are wholly owned by HAB. In developing the Serdang Perdana Project, QSB was

appointed by the second defendant as its subcontractor whom in-turn appointed Pakatan and Precast as subcontractors.

[44] In the midst of the construction, the first defendant, second defendant and HAB faced financial difficulties and unable to pay QSB for work done and it follows that QSB could not pay its subcontractors. The subcontractors then refused to continue the works unless they are paid accordingly. Following from that QSB had a discussion with PW3 (witness for the plaintiff in both suits) who is the director of first and second defendant also HAB offered a contra settlement to settle debts where it was deliberated and agreed that the outstanding sums to all the subcontractors to be settled by giving them properties built in the project. This settlement arrangement is not limited to the QSB, but also applies to all the subcontractors appointed by the second defendant.

[45] Subsequently the plaintiffs agreed and accepted the offer and executed the S&P. The S&P was entered between the plaintiffs and the first defendant where by PW3 signed on behalf the first defendant. Following the contra settlement, the plaintiff did not make any payment towards the purchase price for units concerned.

[46] The burden of proving that the first defendant was a party to the contra agreement and need not pay the consideration under the S&P is on the plaintiffs.

[47] From the evidence of the witnesses for both cases, only the witness for QSB and PW3 had personal knowledge about the contra settlement. PW3 testified that he was also the directors for the first defendant and the second defendant and represented the interest of both defendants and HAB. It is also his evidence that he was the duly authorised representative of HAB for the first defendant. This fact was not disputed that PW3 was appointed by HAB to be in charge of the development project of the first defendant. PW3 was duly authorised to oversee the entire project from its building progress to the financial aspect of mattersand decides on all matters pertaining to the development project. PW3 further confirmed that in that position he held and chaired the weekly meetings with the contractors. PW3 also confirmed that he made all the decisions on all matters arising in the course of business. PW3's position of importance in the first defendant and the second defendant can be seen from the fact that HAB appointed him as the representative of HAB in the first defendant pursuant to s 147(3) of the Companies Act 1965 and not anyone else. It is a trite law that a company can only act through its directors and is responsible for any liability attached thereto.

[48] PW3 testified that in the midst of the constructions, the first defendant,

second defendant and HAB faced financial difficulties and unable to pay its subcontractors. The subcontractors then refused to continue the works unless they were paid accordingly and guarantee is given for payment. The Board of HAB agreed that this issue is to be resolved by giving the subcontractors properties built in the development project. HAB offered a contra settlement to settle debtswhere it was deliberated and agreed that the outstanding sums to all the subcontractors are settled by giving them properties built in the project. This contra settlement is not limited to the QSB, but also applies to all the subcontractors appointed by the second defendant. The contra settlement was to ease the cash flow of the first defendant in the development and the ultimate intention was to have the inter-company debts between the first defendant, second defendant, HAB and the subcontractors. PW3 was the one involved in the settlement and implementation of the contra settlement and agreed in his capacity as the director of the first defendant. He also was the person who signed the S&P on behalf of the first defendant. The courts finds that PW3 as the director in charge of the project of the first defendant and the common director acting for the three companies obviously had the authority to agree to the contra settlement for and on behalf of the first defendant in order to protect the interest of the company. The court accepted PW3 evidence in its entirety since his testimony reflects his full understanding in the running of the development project and the problems faced and his transparency in the decision making in solving the debts issue.The contra settlement was to benefit the first defendant as the unpaid work is completed by the QSB and subcontractors for the development project belonging to the first defendant. There would not be a need for contra settlement if the first defendant had paid the construction works.

[49] The court finds that the conduct of the first defendant demonstrates that it had agreed to the terms of the contra as evidenced by series of letters, the S&P and mutual covenant. The letters are as follows:

(a) in respect to Suit No 22NCVC-401–05 of 2013:

(i) letter dated 25 October 2000 (at p 307 Bundle C) from Precast to the first defendant undertaking to pay the purchase price;

(ii) letter dated 25 October 2000(at p 308 Bundle C) from Precast to the second plaintiff undertaking to pay the purchase price to the first defendant for and on behalf of the second plaintiff; and

(iii) letter dated 6 November 2000 (at p 311 Bundle C) from HAB to the first defendant undertaking to pay the purchase price. (This letter is signed by PW3 as the director of the second defendant);

(b) in respect to Suit No 22NCVC-426–06 of 2013:

(i) letter dated 26 April 001 (at p 35 Bundle B) from the QSB to the second defendant confirming discussion between PW3 and the

QSB of the contra and the amount;

(ii) letter dated 10 May 2001 (at p 36 Bundle B) from Pakatan to the QSB confirming agreement to accept the subject property in contra; and

(iii) letter dated 12 May 2001 (at p 37 Bundle B) from the QSB to the second defendant confirming agreement of Pakatan to accept the subject property in contra.

[50] Furthermore, the first defendant did not object to it at any point of time. The court is of the view that if the contra settlement is not agreed upon by the first defendant certainly it would have challenged and pursued a claim or even would have terminatedthe S&P. The evidence shows that no claim for the purchase price of the units was ever made by the first defendant even as late as 2006 which was fiva years after the date of execution of the S&P. When PW3 signed the S&P, he signed it with full knowledge that he is representing himself as the director of the first defendant pursuant to the contra settlement and that the first defendant has agreed to the contra settlement. In *Butler Machine Tool Co Ltd v Ex-Cell-O Corpn (England) Ltd* [1979] 1 WLR 401 where the court held that:

> ... The better way is to look at all the documents passing between the parties — and gleaned from them, or from the conduct of the parties, whether they have reached agreement on all material points ...

Therefore the court finds that the conduct of the first defendant has shown acceptance of the contra settlement. It follows that the estoppel by conduct applies against the first defendant in denying that there was in fact a contra settlement during the period before the change of management.

[51] The first defendant's defence is that it did not agree to the contra settlement and as such the sale of the unit pursuant to the S&P is a normal transaction. Since there is no payment made, the first defendant is entitled to terminate the S&P. The court is unable to agree with the first defendant's argument that the transaction entered between them and the plaintiffs is strictly a normal S&P since the first defendant did not terminate the contract when the purchase price was not paid. The first defendant's conduct did not purse the claim for the purchase or otherwise terminate the S&P at the earliest opportunity goes to show that first defendant is aware and accepted the terms of the contra settlement. The court finds that the evidence shows that the S&P was entered by the first defendant with the intention to settle the debt equivalent to the value of the units. It was also the intention of the first defendant that the sale price stated in the S&P is to set off against the monies due for work done by the subcontractors and was made with full knowledge and consent of HAB, first defendant and second defendant. This settlement

was accepted by the plaintiffs which had resulted to the signing of S&P and all parties agreed that the purchase price was deemed fully paid. The resumption of the development work was under the belief by the plaintiffs that the debt was settled by the contra settlement. The work was completed and the first defendant had benefited from it is a good consideration under the Contracts Act 1950. Therefore the court finds that the issue of the contra agreement be void for want of consideration does not arise because it had been settled by way of contra with debts.

[52] The defendants submitted that the contra settlement is a direct contradiction with the terms of the S&P and is not permissible under ss 91 and 92 of the Evidence Act 1950. The oral contract must not be inconsistent with the written contract. The court is of the considered view that although there was an absence of a written contra settlement, the court is not limited to examine other evidences that such arrangement exist between the parties concerned. The evidences before this court have revealed the conduct and related documents including series of letters that had indicated the first defendant indeed had agreed to the contra settlement. The conduct of PW3 being an independent witness, in making decision and solving the debt problem had exhibited his authority or capacity to act for the first defendant. The court also finds that the S&P is not in direct contradiction with the contra settlement since both must be read together. The existence of the S&P was the result of the contra settlement and it was only to settle the debt owed to the respective parties.

[53] The court took cognisance that the first defendant also chooses not to call witnesses such the other directors as to whether the first defendant agreed to the contra settlement or not at the material time instead decided to call one DW1 who had no personal knowledge about the contra settlementas she was not even in the employment of the first defendant in 1999–2002. DW1 joined the first defendant only in 2005 and is not the best person to give evidence on whether the first defendant agreed to the contra settlement. DW1 testified that she did not verify with the previous directors of the first defendant of the second defendant about the contra settlement. She in fact admitted that the first defendant would have agreed to the contra settlement but she just would not know as she was not with the company at the material time. By virtue of the first defendant refusal or failure to call the material witnesses, the court had to draw an adverse inference against the first defendant pursuant to s 114(g) of the Evidence Act 1950. Therefore the court finds that in the absence of any other testimony to the contrary by directors during the material period of 2001–2002, PW3's testimony ought to prevail and accepted by the court.

[54] As to the defendant contention that there is no resolution giving PW3 authority to agree to the settlement agreement for and on behalf of the first

defendant, the court noted that it is sufficient for plaintiffs to deal with PW3 because PW3 was the director who made all the decision in respect of the project at the material time. He also was the director who implemented the term of the contra settlement and had signed the relevant letters and relevant document especially the S&P and the deed of mutual covenant for and on behalf of the first defendant. PW3 is the main person in respect of the development project. When one deals with a director of high position, one is not required to enquire whether the director had authority to act accordingly. In *Kreditbank Cassel GMBH v Schenkers, Limited* [1927] 1 KB 826 where Lord Atkin LJ opined:

> If you are dealing with a director in a matter which normally a director would have power to act for the company you are not obliged to inquire whether or not the formalities required by the articles have been complied with before he exercises that power.

Section 20(2) of the Companies Act 1965 expressly states that any such lack of power or capacity can only be relied upon in proceedings against the company by its members. Section 20(1) of the Act states that no transaction entered into on behalf of a company by an officer or agent of the company under any purported authority whether express or implied can be invalidated by sole reason of lack of capacity or power. Furthermore when a person deals with a company in good faith he need not inquire into the internal regularity of the company as per the rule in *Turquand*'s case — 'indoor management rule', (see *Royal British Bank v Turquand* (1855) 5 E & B 248). As such the court finds that the plaintiffs have acted in good faith under the belief that PW3 had the authority to act for and on behalf of first defendant, refer *Mahfuz bin Hashim v Koperasi Pekebun Kecil Daerah Segamat & Ors* [2005] 3 MLJ 726; [2004] 8 CLJ 402.

[55] Having heard the evidences before me and submissions from both learned counsel and after having given much consideration based on the reasons as set out above, the court is satisfied, on the balance of probabilities, that the plaintiffs had established and proven the fact that the first defendant had agreed to the contra settlement and the plaintiffs are entitled to their claim. The plaintiffs' claim as prayed in the statement of claim is allowed. Costs of RM20,000 agreed by both parties for both cases.

Plaintiffs' claim allowed with costs of RM20,000.

Reported by Kohila Nesan